

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA

WILLIAM D. POWELL,	)	No. CV-F-05-606 OWW
	)	(No. CR-F-02-5348 OWW)
)	
Petitioner,	)	MEMORANDUM DECISION AND
	)	ORDER DENYING PETITIONER'S
vs.	)	MOTION TO VACATE, SET ASIDE
	)	OR CORRECT SENTENCE PURSUANT
	)	TO 28 U.S.C. § 2255 (Doc.
UNITED STATES OF AMERICA,	)	85) AND DIRECTING CLERK OF
	)	COURT TO ENTER JUDGMENT FOR
	)	RESPONDENT
Respondent.)	
)	
)	

On May 5, 2005, Petitioner William D. Powell, *proceeding in pro per*, filed a motion to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255.

Petitioner was charged with possession of a firearm in a federal facility, a Class A misdemeanor, in violation of 18 U.S.C. § 930(a). Petitioner consented to proceed before the United States Magistrate Judge. (Doc. 4). Petitioner pleaded guilty pursuant to a written Plea Agreement. (Docs. 24 & 26). Petitioner was sentenced on September 17, 2003, to a \$300 fine

1 and a one-year term of supervised release. (Doc. 30).

2 Petitioner did not appeal his conviction or sentence.

3 On June 14, 2004, a Petition for Warrant or Summons for
4 Offender Under Supervision was filed. (Doc. 32). Petitioner was
5 arrested and ordered detained. (Doc. 36). Petitioner was
6 represented by Federal Defender Mark Lizarraga. A Superseding
7 Petition for Warrant or Summons for Offender Under Supervision
8 was filed on October 6, 2004, alleging three violations of the
9 terms of supervised release. (Doc. 39). On October 8, 2004,
10 Petitioner admitted Charge 2 of the Superseding Petition, with
11 the proviso that Charges 1 and 3 would be dismissed at the time
12 of sentencing. (Doc. 40). Petitioner filed a Sentencing
13 Memorandum on December 1, 2004. (Doc. 68). After a sentencing
14 hearing on December 1, 2004 before Magistrate Judge Snyder,
15 Petitioner was sentenced to 9 months in custody and a 12-month
16 term of supervised release. (Docs. 69-70). On December 7, 2004,
17 Petitioner filed an appeal to the District Court of his sentence
18 based on a violation of Rule 43, Federal Rules of Criminal
19 Procedure during the December 1, 2004 hearing. (Docs. 71 & 77).

20 During the briefing of the appeal, Petitioner, acting *in pro*
21 *per*, filed his Section 2255 motion.

22 Petitioner's appeal was granted; his sentence was vacated
23 and the matter remanded to a randomly assigned Magistrate Judge
24 other than Magistrate Judge Snyder for resentencing. (Docs. 87 &
25 96).

26 On February 1, 2006, Petitioner, then represented by Federal

1 Defender Melody Walcott,¹ was sentenced by Magistrate Judge Beck
2 for the admitted supervised release violation to 9 months in
3 custody with 9 months credit for time served and no term of
4 supervised release. (Docs. 107 & 111). On February 13, 2006,
5 Petitioner filed a Notice of Appeal from the Judgment for
6 Revocation of Probation. (Doc. 110).²

7 Petitioner's Section 2255 motion asserts that he was denied
8 his right of self-representation, contending that "on Dec. 1,
9 2004, the Judge informed me I could not represent myself."

10 Because Petitioner's Section 2255 motion was filed during
11 the pendency of his appeal to the District Court, the motion is
12 premature. See *Feldman v. Henman*, 815 F.2d 1318, 1320 (9th
13 Cir.1987). Nonetheless, Petitioner's claims are without merit.
14 The transcript of the sentencing proceedings before Magistrate
15 Judge Snyder on December 1, 2004 (Doc. 98), reveals no request by
16 Petitioner to represent himself. A defendant has a
17 constitutional right to represent himself in a criminal trial.
18 *Faretta v. California*, 422 U.S. 806 (1975). However, because a
19 defendant who wishes to represent himself gives up many benefits
20 associated with the right to counsel, the decision to represent
21 himself must be knowing, intelligent and voluntary. In addition,
22 the request for self-representation must be unequivocal. *Jackson*
23 *v. Ylst*, 921 F.2d 882, 888 (9th Cir. 1990). The only statement

24 ¹Federal Defender Walcott was substituted as counsel for
25 Petitioner on October 21, 2005. (Doc. 100).

26 ²Petitioner's appeal will be addressed by separate Memorandum
Decision and Order.

1 by Petitioner at the December 1, 2004 hearing that might
2 conceivably relate to self-representation is the following:

3 THE DEFENDANT: No, what I'm talking about her
4 [Lisa Garofalo] statement from here is a
charade.

5 THE COURT: Well, let's find out. Let's find
6 out. Mr. Lizarraga has strongly represented
7 your interests in chambers. He's very - he
8 agrees with you, and he's very upset with all
of this, so you have excellent representation
regarding that, and he's your mouthpiece.

9 THE DEFENDANT: I beg to differ there, but --

10 THE COURT: Well, I've had a lot of experience
11 with lawyers over the years, and every case
12 is different, and I understand, Mr. Powell,
13 everybody knows, and Mr. Horner assures me,
14 and everybody assures me that you are an
15 extremely bright man, very bright. Brighter
than most, and I don't take exception with
that, or disagree with it. I think that
probably were things differently, you might
be able to represent yourself down the road.
Maybe you should go to law school when this
is all over, given all your experiences.

16 But nonetheless, we've got the system we've
17 got, we're stuck with it one way or the
18 other. Mr. Lizarraga has done his homework.
He --

19 THE DEFENDANT: And I have had a
20 (unintelligible), represent, and then if it's
21 done, and then you are allowed to ask some
22 questions, because I obviously am not going
23 to be able to.

24 [RT 5:1-24]. To the extent that Petitioner intended to request
25 that he be allowed to represent himself at the December 1, 2004
26 sentencing hearing, his request, which is ambiguous, if not
unintelligible, was not unequivocal. At most, Petitioner
expressed reservations about Mr. Lizarraga's representation of

1 Petitioner in the proceedings before the Court. At no time
2 during the December 1, 2004 sentencing hearing did Petitioner
3 request to be allowed to exercise his constitutional right of
4 self-representation.

5 Petitioner further claims that he was denied his right of
6 self-representation with the assistance of counsel, contending
7 that Mr. Lizarraga "would not present my defense." Petitioner
8 contends that he was denied the effective assistance of counsel:

9 Federal Defender refused to argue my defense.
10 Federal Defender did not argue Probation
11 Officer's dispositional memorandum the Judge
used in sentencing made up of misleading and
inaccurate statements.

12 Petitioner's claims are without merit. The transcript of
13 the December 1, 2004 sentencing hearing establishes that
14 Petitioner believed that Ms. Garofalo and various state officials
15 lied in state court proceedings leading to his *nolo contendere*
16 plea on March 29, 2004 to a misdemeanor violation of a
17 restraining order issued by the Stanislaus Superior Court and
18 that Ms. Garofalo lied to the Federal Probation Officer in
19 connection with the dispositional memorandum. Mr. Lizarraga
20 raised the credibility of Ms. Garofalo both in the Sentencing
21 Memorandum, (Doc. 68), and during his examination of Ms. Garofalo
22 at the December 1, 2004 hearing and in his argument to Magistrate
23 Judge Snyder. Petitioner's arguments and assertions that his
24 state misdemeanor conviction, which led to the filing of the
25 Superseding Petition was a frameup and marred by lying witnesses,
26 District Attorneys, and collusive judges is not a defense to the

1 Superseding Petition. Petitioner pleaded *nolo contendere* to the
2 state charge. If Petitioner believes that the state charge and
3 his *nolo contendere* plea were unconstitutionally or illegally
4 obtained, his remedy, as Magistrate Judge Snyder pointed out, is
5 to first challenge that conviction in state court and then bring
6 a petition for habeas corpus pursuant to 28 U.S.C. § 2254 in
7 federal court. Because Petitioner did not challenge his state
8 court conviction in state court, this Court has no jurisdiction
9 to consider his contentions. Mr. Lizarraga's failure to present
10 a futile defense is not ineffective assistance of counsel.

11 Petitioner claims that his "presence denied in plea
12 bargaining process" and that the "Federal Defender denied by
13 participation in plea bargaining."³ Petitioner claims that his
14 right to due process was violated.

15 Petitioner presumably refers to the apparent agreement that
16 Petitioner would admit Charge 2 of the Superseding Petition in
17 exchange for the dismissal of Charges 1 and 3 at the time of
18 sentencing. Petitioner cites none and the Court is unaware of
19 any authority that a convicted defendant has any constitutional
20 right to be present during plea negotiations between the
21 prosecutor and defense counsel.

22 For the reasons stated:

23
24 ³Petitioner also asserts that Magistrate Judge Snyder removed
25 Petitioner from the courtroom during the examination of Ms.
26 Garofalo during the sentencing hearing. This claim for relief is
moot because it was addressed by prior order that Petitioner's
sentence was vacated and remanded for resentencing based of
Petitioner's physical removal from the courtroom.

1 1. Petitioner's motion to vacate, set aside or correct
2 sentence pursuant to 28 U.S.C. § 2255 is DENIED;

3 2. The Clerk of the Court is directed to enter JUDGMENT FOR
4 RESPONDENT.

5 IT IS SO ORDERED.

6 Dated: September 11, 2008

/s/ Oliver W. Wanger
UNITED STATES DISTRICT JUDGE